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DISTRICT COURT OF GUAM TERRITORY OF GUAM

JULIE BABAUTA SANTOS, *et al.*,

Petitioners,

vs.

FELIX A. CAMACHO, etc., *et al.*,

Respondents.

CIVIL CASE NO. 04-00006

**PETITIONER'S RESPONSE TO
RESPONDENT GOVERNOR'S
OBJECTION TO PETITIONER'S
MOTION FOR APPROVAL OF THE
ADMINISTRATION PLAN**

The Petitioner, individually and on behalf of all those similarly situated (hereinafter "EIC Class"), through her attorneys of record Phillips and Bordallo, P.C., by Ricardo D. Bordallo, hereby submits this Response to Respondent Governor Felix P. Camacho's Objections to Petitioner's Motion for Approval of the Administration Plan.

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BACKGROUND

On February 12, 2004, Petitioner brought this Class Action Petition for the recovery of unpaid refundable earned income tax refunds and to compel the full implementation of the Earned Income Program. On March 11, 2004, Respondents filed an Opposition to the Petition, denying various allegations and setting forth numerous affirmative defenses. This Court issued an expedited Scheduling Order on April 30, 2004, and held a Scheduling Conference on May 26, 2004.

On June 14, 2004, shortly after the local media revealed that the Camacho administration had just paid one taxpayer his 1998 Earned Income Tax Credit payment, the parties entered into a Settlement Agreement, subject to this Court's approval. The proposed Settlement Agreement created a settlement class, known as the "EIC Class," defined to include all persons who (a) filed Guam income tax returns and (b) were and are entitled to be paid refundable earned income tax credits under the Guam Territorial Income Tax and the Earned Income Program for any or all of the following tax years: 1996, 1998, 1999, 2000, 2001, 2002 and 2003. The proposed Settlement Agreement provided for a Settlement Amount of Sixty Million Dollars (\$60,000,000) to be made available by the Government of Guam to pay for claims made by members of the EIC Class and other fees and expenses in accordance with the Settlement Agreement.

The Government of Guam agreed to pay into an EIC Settlement Fund the amount of Three Million Dollars (\$3,000,000) by July 17, 2004, and a total of Twenty Million Dollars (\$20,000,000) by the end of June, 2005. Under the proposed agreement, the Government of Guam also agreed to pay an additional Forty Million Dollars (\$40,000,000) over eight years into the fund, and to fully implement and pay

1 refundable earned income taxes for tax years 2004 and beyond, preventing the need for
2 annual lawsuits. Counsel for Petitioner requested and received confirmation that the
3 first installment was deposited by Respondents as required under the Settlement
4 Agreement, MFP Declaration, attached hereto, par. 13.

5
6 The Plan of EIC Settlement Administration (the "Administration Plan") defines the
7 recovery achieved for Guam taxpayers who qualify as EIC Class Members, outlines the
8 proposed plan for calculations and payments to individuals, sets out methods used to
9 identify EIC Class Members, and lists the duties and responsibilities of the Department
10 of Revenue and Taxation, and counsel for the parties. All matters relating to the
11 Administration Plan are subject to further orders as the Court may issue.

12
13 On June 17, 2004, the Court signed an order granting preliminary approval of a
14 Settlement Agreement entered into between the parties in the above-referenced case.
15 The Settlement Agreement called for payment by the Respondents of sixty million
16 dollars (\$60,000,000) in several installments and the creation of an EIC Settlement
17 Fund for the benefit of EIC Class Members. Section V. of the Settlement provides in
18 part that:

19 The EIC Settlement Fund shall be administered by the
20 Department of Revenue and Taxation under the supervision
21 and direction of the Court. The Department of Revenue and
22 Taxation shall submit quarterly reports to all parties signing
this Agreement, including the Petitioner regarding the
administration of the EIC Settlement Fund.

23 Pursuant to the Order and direction of the Court, the Administration Plan was
24 submitted to the Court for approval on _____. The Administration Plan specifies: (1) the
25 source, custodian, and uses of the EIC Settlement Fund; (2) the duties of the parties,
26 including the Department of Revenue and Taxation; (3) the plan of allocation of the EIC
27
28

1 Settlement Fund among EIC Class Members; and (4) provisions governing distribution
2 to EIC Class Members.

3
4 This Administration Plan, together with subsequent Court orders, if any, will
5 enable the parties to fulfill their responsibilities by maximizing the return to EIC Class
6 Members filing proper claims while maintaining the integrity of the EIC Settlement Fund
7 and expediting payments to EIC Class Members.

8 On July 29, 2004, Applicant for Intervention Christina M.S. Naputi filed a motion
9 to intervene. On July 6, 2004, Applicant for Intervention Charmaine Torres filed a
10 motion to intervene.

11 On July 14, 2004, Petitioner filed a Motion for an Order Approving Class
12 Counsel, or, in the Alternative, for an Order Designating Interim Counsel; for an Order
13 Preliminarily Approving Attorney Fees pursuant to Federal Rules of Civil Procedure
14 54(d) and Rule 23(h); for an Order Approving Additional Notice to Proposed Class
15 Members; and for an Order Continuing the Hearing on Final Approval and Extending the
16 Objection and Opt Out Date.

17
18 On July 16, 2004, this Court vacated the original Objection and Opt Out Date of
19 August 9, 2004 and the November 9, 2004 hearing date on final approval of the
20 Settlement Agreement, pending resolution of two Motions for Intervention. This Court
21 also appointed Michael F. Phillips as the interim counsel for the EIC Class. The order
22 did not address the motion for preliminary approval of attorney fees.

23
24 On August 5, 2004, the Honorable John C. Coughenour, United States Chief
25 District Judge for the Western District of Washington, sitting by designation, denied the
26 Motions for Intervention filed by Applicants Naputi and Torres.

1 On October 25, 2004, Petitioner filed a Motion for Orders Approving the
2 Administration Plan and Amended Notice and For Orders Establishing the Fairness
3 Hearing Date and Objection and Opt Out Date, and Vacating the April 30, 2004
4 Scheduling Order. On November 8, 2004, this Court issued an Order from United
5 States District Judge Morrison C. England of the Eastern District of California, informing
6 the parties that Magistrate Judge Joaquin V.E. Manibusan, Jr. would resume his
7 authority over this case through full disposition. On the same date, Respondents,
8 through their attorney of record, Attorney General Douglas B. Moylan, filed their
9 Response to Petitioner's Motion for Orders Approving the Administration Plan, etc.

10
11 On November 9, 2004, Respondent Governor, through independent counsel,
12 filed a Request for Hearing and Objection to (1) Petitioner's Motion for Orders
13 Approving the Administration Plan and Amended Notice; and (2) The Attorney General
14 of Guam's MPA in Response to Motion for Orders Approving Administration Plan
15 ("Governor's Request").
16

17 On November 12, 2004, this Court, although recognizing that there may be
18 questions as to the timing of such a request, granted a hearing so that Governor
19 Camacho may be heard. The Court scheduled a hearing on this matter for December
20 17, 2004.

21 On November 24, Respondent Governor, through independent counsel, filed
22 Points and Authorities in Support of Opposition to Petitioner's Motion for Approval of the
23 Administration Plan. On the same date, Respondent Directors Perez and Ilagan,
24 through independent counsel, filed a Request for Hearing and Objections under the
25 same format as the Governor's Request earlier filed.
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1 On November 29, 2004, Respondent Governor, through independent counsel,
2 filed an Amended Memorandum of Points and Authorities in Support of Opposition to
3 Petitioner's Motion for Approval of the Administration Plan ("Governor's A.M.").
4

5 On December 6, 2004, Respondents, through their attorney of record Attorney
6 General Douglas B. Moylan, filed a Motion for Relief from this Court's Order issued on
7 November 12, 2004; a Motion to Strike Entry of Appearance of Attorney Mantanona and
8 all Subsequent Documents; a Motion to Strike Entry of Appearance of Calvo & Clark,
9 LLP and Purported Entry of Appearance of Attorney Shannon Taitano and all
10 Subsequent Documents. ("AG Motions for Relief"). On December 7, 2004,
11 Respondents, through their attorney of record Attorney General Douglas B. Moylan,
12 filed a Response to Governor's Objections and Opposition to Petitioner's Motion for
13 Approval of the Administration Plan ("AG Response to Governor").
14

15 ARGUMENT

16 **A. RESPONDENT GOVERNOR'S ATTEMPT TO "INTERVENE" IN THIS** 17 **MATTER TO FURTHER DELAY THE PROCEEDINGS MUST BE** 18 **DENIED**

19 Respondent Governor Camacho's (the "Governor") Request to be heard by this
20 Court and subsequently filed documents raise questions not only regarding ill-advised
21 timing, but blatant technical deficiencies. See generally AG Motions for Relief; and AG
22 Response to Governor, p.13 ("no motion under FRCP 60(b) to vacate the Court's Order
23 of June 17, 2004 preliminarily approving the Settlement Agreement has been filed.").
24 Petitioner takes note of the Attorney General's requests regarding the inherent
25 deficiencies of the Governor's submissions, and submits this Response subject to this
26 Court's resolution of such deficiencies. Indeed, the Governor's submission seeks to
27
28

1 delay the proceedings of this case by requesting this Court to vacate a previous order
2 preliminarily approving the Settlement Agreement, without even attempting to cite and
3 meet the appropriate standard under the Federal Rules of Civil Procedure.
4

5 A review of the Governor's submissions demonstrates, as provided below, that
6 his "concerns" have little, if any, relation to Petitioner's Motion for Approval of the
7 Administration Plan, or even as set forth to this Court, the illegality of the Settlement
8 Agreement. Rather, it is apparent the Governor requested a hearing before this Court
9 not to address "concerns" regarding the Administration Plan or the illegality of the
10 Settlement Agreement, but to launch an ill-timed substantive attack in the nature of a
11 weak case for Intervention, or at best in the nature of objections by a class member
12 pursuant to FRCP Rule 23(e)(4)(A), more properly heard at a Fairness Hearing.
13 Another proper description of the Governor's submissions to this Court is the
14 proceeding by a party with arguing the merits of the case despite a valid Settlement
15 Agreement before the Court.
16

17 The Governor's submission to this Court is not only wholly lacking with regard to
18 the relief he requests, but is ripe with misleading statements and a blatant
19 misunderstanding of the proceedings in this case. Several misleading statements are
20 repeated throughout his submission or are otherwise generally relied upon for his
21 assertions before this Court. According to the Governor:
22

23 The Governor does not have access to anything close to the
24 amount of the monthly payments in unencumbered funds
each month that are required by the settlement agreement.

25 Governor's A.M., p.11.
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1 However, Petitioner confirmed shortly after the preliminary approval of the
2 Settlement Agreement that the Governor was able to make the largest deposit required
3 under the Settlement Agreement. Only last month, the Governor identified millions of
4 dollars in lapsed funds which were transferred to his office. KUAM News, November
5 19, 2004, attached as Exhibit "A".
6

7 The Governor also alleges throughout his submission that the Settlement
8 Agreement and the Administration Plan calls for the "diversion of \$6 million in attorneys'
9 fees," and "\$1 million in administrative fees." See Governor's A.M., p.13. The
10 Governor's allegations are completely misplaced. As this Court is aware, the record in
11 this case includes an outstanding motion by Petitioner for the appointment of counsel
12 and for attorney fees. Further, as the record in this case makes clear, only this Court
13 can approve attorney fees pursuant to a motion and only after class members have the
14 opportunity to object. Indeed, the Governor makes the allegation that "no motion was
15 filed" and "no class member was given the opportunity to object." Governor's A.M.,
16 p.18. The Governor's apparent failure to properly review the entire record in this case,
17 including the Amended Notice at issue now before the Court, has tainted many of the
18 premature claims he makes throughout his submission. The Governor also asserts
19 wrongly that the Administration Plan "would allow petitioner's counsel to receive fees
20 before amounts were actually disbursed to class members." The Administration Plan
21 does not authorize the expenditure for attorney's fees. The Administration Plan
22 recognizes that "[o]nly upon application by Counsel and approval of the Court" are
23 attorney fees set aside for payment to Counsel.
24
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The Governor also alleges a diversion of \$1 million in administrative fees, mistakenly referencing the fees as proceeding from the settlement amount of \$60 million. See Governor's A.M., p.17.

As more fully discussed below, the Governor has relegated himself to representing the objection-type interests of a class member at a fairness hearing. Nevertheless, the Governor's specific misunderstanding as it relates throughout his submission is important. As the record demonstrates, the government of Guam, through the Department of Revenue and Taxation, agreed to administer the EIC Settlement Fund as part of its consideration for the settlement of the underlying legal dispute. The administration of the settlement by the government of Guam was recognized in the Settlement Agreement and is an additional benefit to the class, having no effect their entitlement to the settlement amount.

B. RESPONDENT GOVERNOR'S "CONCERNS" REGARDING CRIMINAL LIABILITY AND SETTLEMENT ILLEGALITY ARE UNFOUNDED

In the Governor's Request, the Governor "respectfully asks for the opportunity to submit a brief stating his concerns about the Plan and an opportunity to be heard by this Court." Governor's Request, p.2. The Governor alleges that he "has been deprived of any opportunity to make his concerns known on a matter of great public importance." Governor's Request, p.2. After alleging the apparently common quarrel he has with the Attorney General's representation, he alleges the outrageousness of the Attorney General's failure to disclose the nature of the Governor's "concerns." Governor's Request, p.2-3.

The Governor proceeds to address his concerns as lying in two areas of Guam law. The Governor states that his "concern" is that the Settlement Agreement is "illegal"

1 based on specific provisions of Guam law. The Governor cites 5 G.C.A. §22401(a)(2)
2 and (3) as rendering the Settlement Agreement illegal. The provision provides in part
3 as follows:
4

5 **§22401. Illegal Expenditures.** (a) No officer or employee
6 of the government of Guam, including the Governor, shall . .

7 (2) Commence, continue, or proceed with any
8 operational activity, construction, improvement, contract, or
9 obligation without an appropriation or fund for the payment
10 thereof; or after any such appropriation or fund is exhausted;

11 (3) Involve the government of Guam in any contract or
12 other obligation, for the payment of money for any purpose,
13 in advance of the appropriation made for such purpose . . .”

14 The Governor assumes that the legal dispute resolved by the Settlement
15 Agreement fits within the prohibitions outlined in the provisions above, essentially
16 implying that the payment of refundable earned income tax refunds requires an
17 appropriation. The Governor indeed asserts this exact proposition in his Amended
18 Memorandum:
19

20 . . . although sometimes called a ‘refund’ because it is
21 administered as though it was a refund, the EITC is actually
22 a social subsidy, and not a true refund at all . . . Because it is
23 a subsidy, the only proper source of paying back EITC
24 payments has to be an appropriation.

25 Governor’s A.M., p.14.

26 Under the Organic Act of Guam, the income tax laws in force in Guam include,
27 among others, “all provisions of subtitle F which apply to the income tax . . .” 48 U.S.C.
28 §1421i(d). Section 6402, under subtitle F, in conjunction with the substitution of terms
provided under Section 1421i(e), provides in relevant part as follows:

§ 6402. Authority to make credits or refund. (a) General
rule. In the case of any overpayment, the [Governor or his
delegate] . . . may credit the amount of such overpayment . .

1 . against any liability . . . and shall . . . refund any balance to
2 such person.

3 26 U.S.C. § 6402 (emphasis added).

4 The refund of the balance is subject only to specified offsets not applicable here,
5 and certainly not subject to legislative appropriations. The "overpayment" identified in
6 Section 6402 clearly encompasses the excess of credits allowed under the earned
7 income credit provision against tax liability. 26 U.S.C. § 6401(b)(1) ("If the amount
8 allowable as credits under subpart C of part IV of subchapter A of chapter 1 (relating to
9 refundable credits) exceeds the tax imposed by subtitle A . . . the amount of such
10 excess shall be considered an overpayment."). The Governor's attempt to
11 recharacterize refundable earned income credits as subsidies fails to address his or his
12 delegate's authorization and mandate to pay tax refunds under applicable law, without
13 resort to an excuse involving a lack of appropriation.

14
15 Interestingly, the Governor cites Sorenson v. Sec'y of Treasury, 475 U.S. 851
16 (1986) for support of the purpose of the earned income credits, yet the same case
17 clearly explains the operation of Section 6402(a) and the tax refund process: "[Section]
18 6402(a) directs the Secretary to credit or refund 'any overpayment' to the person who
19 made it. An individual who is entitled to an earned-income credit that exceeds the
20 amount of tax he owes thereby receives the difference as if he had overpaid his tax in
21 that amount." Sorenson, 475 U.S. at 862 (emphasis added). The Supreme Court also
22 explained:
23

24 [Section] 6402 provides a mechanism for disbursing
25 overpayments, namely, the income tax refund process. The
26 refundability of the earned-income credit is thus inseparable
27 from its classification as an overpayment of tax. Petitioner
28 therefore acknowledges that the excess earned-income

1 credit is an "overpayment" for purposes of §6402(a), the
2 general provision that authorizes all tax refunds. If it were
3 not, the Secretary would lack authorization for refunding it to
4 her.

5 Id. at 865 (emphasis added).

6 Without question, the Governor or his delegate, pursuant to the Guam Territorial
7 Income Tax and authoritative case law, is authorized and mandated to provide refunds
8 to taxpayers, including refunds made possible by refundable earned income tax credits,
9 notwithstanding any lack of appropriation.

10 The Governor also presents a creative but illogical argument regarding Organic
11 Act Section 1421i(h)(2). The provision provides in part as follows:

12 Suits for the recovery of any Guam Territorial income tax
13 alleged to have been erroneously or illegally assessed or
14 collected . . . or of any sum alleged to have been excessive
15 or in any manner wrongfully collected, under the income-tax
16 laws in force on Guam, may, regardless of the amount of
17 claim, be maintained against the government of Guam . . .
When any judgment against the government of Guam under
this paragraph has become final, the Governor shall order
the payment of such judgments out of any unencumbered
funds in the treasury of Guam.

18 The Governor argues that the mandate of this provision to the Governor to pay
19 judgments out of unencumbered funds "left out" his authority to "contract for such 'final
20 judgments.'" Governor's A.M., p.11. The argument proceeds therefore that because
21 the mandate to the Governor under the provision above excludes the payments that
22 would be made under the Settlement Agreement, the Governor's payments under the
23 provisions of the Settlement Agreement, even if finally approved by the Court, would
24 result in criminal liability under the Illegal Expenditures Act.
25

1 The Governor is mistaken as a matter of law. First, the Governor's argument
2 presumes that a "final judgment" is precluded in the context of the Settlement
3 Agreement. The Governor's authority for this presumption is wholly lacking, and is
4 limited to referencing two inapplicable cases: one stating that the enforceability of
5 settlements are generally governed under principles of contract law, and the second
6 referencing the enforcement of a provision of settlement agreement concerning
7 construction contracts which made the agreement subject to a contingency on funding.
8 Governor's A.M. (citing Jeff D. v. Andrus, 889 F.2d 753, 759 (9th Cir. 1989) and
9 Blackhawk Heating & Plumbing Co. v. United States, 622 F.2d 539, 553 (Claims Ct.
10 1980)).

11
12 The existence of a final judgment is not precluded in the context of a settlement
13 agreement. A final judgment or order is one that conclusively determines rights of
14 parties to litigation, leaving nothing for court to do but execute order. Lewis v S.L. & E.,
15 Inc., 746 F2d 141 (1984, CA2 NY). Indeed, "[a] judicially approved settlement
16 agreement is considered a final judgment on the merits." Rein v. Providian Fin. Corp.,
17 270 F.3d 895 (9th Cir. 2001) (Citing In re Dominelli, 820 F.2d 313, 316-17 (9th Cir.
18 1987))(emphasis added).

19
20 In the case at hand, not only would final approval of the Settlement Agreement
21 and entry of final judgment conclusively determine the rights of the parties to this case,
22 the Settlement Agreement expressly contemplates a final judgment and release of the
23 claims at issue. See Settlement Agreement, Part II.C ("Upon final approval of the
24 settlement agreement, the Court is expected to enter judgment which will be
25 enforceable against all parties to this Settlement Agreement"); Part II.F ("At least fifteen
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1 (15) days prior to the date the Court sets for the hearing on final approval of the
2 Settlement, Petitioner will submit a motion for an Order of Approval and Final
3 Judgment"); and Part III ("each member of the EIC Class hereby expressly and
4 irrevocably waives and fully, finally and forever settles and releases all claims demands,
5 actions . . . which was or could have been alleged in the EIC Class Action . . .").
6

7 Second, other than citing two inapplicable cases, the Governor finds support for
8 his proposition that the provision does not support a final judgment in the context of a
9 settlement agreement believing "[s]uch a reading of this statute would permit the
10 Governor (or Lt. Governor when the Governor was gone) to circumvent the
11 appropriations process for any expenditure." Governor's A.M., p.11. The provision
12 enacted by Congress does not apply to "any expenditure." Rather, the provision is
13 limited to cases for the recovery of Guam Territorial income taxes or other penalties or
14 sums collected under the income tax laws. Indeed, the reverse proposition sheds light
15 on the fundamental flaw of the Governor's position. If the Governor's proposition held
16 true, the provision would have to be read as discouraging settlements, rather than
17 encouraging settlements, a principle widely held in practically every jurisdiction,
18 including the Ninth Circuit and federal courts. See Andrus, 889 F.2d at 759;
19 Metropolitan Housing Development Corp. v. Village of Arlington Heights, 616 F.2d 1006
20 at 1013 (7th Cir. 1980). (Federal courts look with great favor upon the voluntary
21 resolution of litigation through settlement). This rule has particular force regarding class
22 action lawsuits. Armstrong v. Board of School Directors of the City of Milwaukee, 616
23 F.2d 305 at 312 (7th Cir. 1980); Particularly in class action suits, there is an overriding
24 public interest in favor of settlement." Cotton v. Hinton, 559 F.2d 1326, 1331 (5th Cir.
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1 1977) (citations omitted). See similar results in cases settled before this Court: United
2 States v. Guam Waterworks Authority and the Government of Guam, Civil Case No. 01-
3 0035; and United States v. Government of Guam, Civil Case No. 02-00022.

4
5 The Governor's position would necessitate an appropriation by the Legislature for
6 every settlement of a refund suit under the Organic Act provision, a position contrary not
7 only as a matter of law, but contrary to common sense.

8 A review of the same case cited by the Governor for the wrong reasons
9 demonstrates the authority of this Court to issue a final judgment and recognizes such
10 authority as the foundation of policy favoring settlements:

11 We rely on basic contract principles to interpret the
12 Stipulation. An agreement to settle a legal dispute is a
13 contract and its enforceability is governed by familiar
14 principles of contract law. Each party agrees to "extinguish
15 those legal rights it sought to enforce through litigation in
16 exchange for those rights secured by the contract." Since
17 consent decrees and orders have many of the attributes of
18 ordinary contracts, they should be construed basically as
19 contracts. Furthermore, enforceability of these compromise
20 agreements is favored in the law.

21 The authority of a trial court to enter a
22 judgment enforcing a settlement agreement
23 has as its foundation the policy favoring the
24 amicable adjustment of disputes and the
25 concomitant avoidance of costly and time
26 consuming litigation.

27 Andrus, 889 F.2d at 759 (citations omitted)(emphasis added).

28 More importantly, however, is the Governor's misunderstanding of the operation
of Section 1421i. The plain language of the provision does not limit the authority of the
Governor or the government of Guam to settle refund suits. Rather, the provision

1 clearly grants taxpayers the right to sue the government of Guam for the refund of taxes
2 and for the payment of any final judgment in such litigation.

3
4 Thus, both premises upon which the Governor basis his "concerns" are legally
5 flawed. As provided above, without question, the Governor or his delegate, pursuant to
6 the Guam Territorial Income Tax and authoritative case law, is authorized and
7 mandated to provide refunds to taxpayers, and the Governor's and his predecessor's
8 continued failure to do so has resulted in the filing of this case. Again, without question,
9 a suit for refunds under Section 1421i(h)(2) before the District Court can be settled by
10 the parties with the issuance of a final judgment. The same provision in the Organic Act
11 mandates that the "Governor order the payment of such judgments out of any
12 unencumbered funds in the treasury of Guam."

13
14 The Governor attempts to hide behind a misinterpretation of local law in support
15 of his theory that a lack of appropriation raises potential criminal liability under the Illegal
16 Expenditures Act. However, the Governor creates conflicting arguments though his
17 own interpretations. First, as provided above, he asserts that since "EITC is actually a
18 social subsidy . . . the only proper source for paying back EITC payments has to be an
19 appropriation." Governor's A.M., p.14. Second, in his reference to local law, he states:
20 "Obviously, these laws [11 G.C.A. Chapters 50 and 51] only authorize expenditures for
21 tax refunds, the EITC, or the child tax credit." (Citing 11 G.C.A. §50105 ("Any and all
22 expenditures from the Fund shall be for the payment of income tax refunds, earned
23 income tax credits, child tax credits.")).

24
25 The Governor is thus confronted with provisions of the Organic Act and
26 applicable federal law mandating the payment of refundable earned income tax refunds
27
28

1 and judgments on refund suits regardless of any lack of appropriation, and with local
2 law authorizing the same type of expenditures without an appropriation. The provisions
3 of the Illegal Expenditures Act are not implicated in any manner by the Settlement
4 Agreement – not only because no appropriation is necessary to pay tax refunds,
5 whether by judgment or otherwise, but also because a local statute cannot otherwise
6 prevent what is authorized and mandated by the Organic Act and federal law applicable
7 to Guam. See § 1423a (“The legislative power of Guam shall extend to all rightful
8 subjects of legislation not inconsistent with the provisions of this Act and the laws of the
9 United States applicable to Guam.”

11 Nevertheless, the Governor attempts to assert a type of “impossibility” defense in
12 explaining the operation of the “reserve fund” mechanism passed by the local legislature
13 in an attempt to force the government of Guam to pay all types of tax refunds on time:
14 “[T]he reserves are done on a year-by-year basis reflecting the present year’s need for
15 reserves. This means that the government cannot reserve, for example, more in 2004
16 than is needed to pay 2004 tax refunds and EITC and child tax credits.” Governor’s
17 A.M., p.13. However, the Governor then immediately admits that the “reserve funds’
18 are exhausted because Guam is trying to pay off a multi-year backlog of refunds
19 developed during the previous administration.” Governor’s A.M., p.14. Thus, the
20 Governor on one side argues that he cannot legally reserve and/or pay prior year
21 refundable earned income tax refunds, but then admits that the processing of refund
22 payments for multiple prior tax years is essentially an ongoing project. The Governor
23 fails to even attempt to explain his differential treatment, but if based on his so-called
24 “subsidy” argument, the Governor’s position has been adequately derailed.
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1 In summary, in the Governor's initial contact with this Court, the Governor
2 outlined his "concerns," alleging the local Illegal Expenditures Act renders the
3 Settlement Agreement illegal. In outlining his arguments before this Court, the
4 Governor has continued on the same track originally started by the previous
5 administrations. The Governor attempts to find a way out of every applicable provision
6 mandating he pay refundable earned income tax refunds, whether pursuant to
7 applicable law, or under the Settlement Agreement pursuant to a final judgment. The
8 Governor wrongfully relies on a local statute to defeat not only other local provisions
9 providing a mechanism to pay refunds on time, but to defeat provisions of the Internal
10 Revenue Code applicable to Guam pursuant to the Organic Act, and specific provisions
11 of the Organic Act. The Governor is also well aware of the case decided by the
12 Supreme Court of Guam, holding without subjection to legislative appropriations, that
13 the "Director, pursuant to section 32 of the I.R.C. which applies to Guam through
14 section 1421i, is required to pay the EIC to eligible Guam taxpayers." In Re Request of
15 I Mina' Bente Sing'ko Na Liheslaturan Guahan Relative to the Application of the Earned
16 Income Tax Program to Guam Taxpayers, 2001 Guam 3 (the Supreme Court
17 confronted the same argument in that case as is set forth by the Governor here, based
18 on issuance of Memorandum Opinion No. DRT/DOA 96-001). The Governor's
19 administration, clearly ignoring the direction from the Supreme Court of Guam, federal
20 law, the Organic Act, and local law, now believes only his office and the current Guam
21 Legislature can remedy the situation:
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24

25 The Governor believes that the appropriate mechanism for
26 making any refunds should be through a claims process
27 established by the Legislature and Governor . . . Only a
28

1 structure established by the Legislature and Governor can
2 remedy the current situation.

3 Letter from Governor Camacho to Speaker Vicente Pangelinan,
4 November 18, 2004, attached hereto as Exhibit "B".

5 **C. THE SETTLEMENT AGREEMENT REACHED BETWEEN THE**
6 **GOVERNMENT OF GUAM AND THE EIC CLASS IS VALID AND**
7 **ENFORCEABLE**

8 Section 1422b of Title 48 U.S.C. provides in part that "[i]n case of the temporary
9 disability or temporary absence of the Governor, the Lieutenant Governor shall have the
10 powers of the Governor. Section 1421g(d)(1) of Title 48 U.S.C. also provides that the
11 Attorney General of Guam is designated as the "Chief Legal Officer for the Government
12 of Guam."

13 The Local Rules of this Court on Settlement conferences provides as follows:

14 **LR 16.6 Settlement Conference.**

15 (a) At any time after an action or proceeding has been filed,
16 any party may file a request for a settlement conference. . . .
17 Each party attending such a conference shall be represented
18 by counsel authorized to participate in settlement
19 negotiations. The Court may require, by Order issued prior to
20 the settlement conference, the client or its authorized
21 representative to personally attend the conference.

22 (b) Each party appearing at all conferences shall have full
23 authority with respect to all matters on the agenda, including
24 settlement of the action or proceeding.

25 In the Governor's Request for a hearing before this Court, the Governor asserts
26 that he is entitled to representation by independent counsel, citing that the issue is now
27 pending before the District Court in several cases involving Proposition A. However, in
28 the case cited, there were questions raised as to whether the Attorney General was
acting on behalf of the government of Guam. In this case, however, the Attorney

General is without question the attorney of record in this case representing Respondents. The Governor was issued a summons from the moment this case was filed. At the first hearing on this matter, the Governor's legal counsel was present, albeit as an "observer." Throughout the proceedings leading to the settlement in June, 2004, the Office of the Attorney General remained the attorney of record in this matter for Respondents, and appeared on their behalf at scheduled hearings.

During the negotiations of the Settlement Agreement, the Governor's cabinet members were intimately involved in the formulation of data and cash flow. Even after the terms of the Settlement Agreement were announced, it was clear that the Governor, whether through his silence or through statements from his office, supported the general terms of the Settlement Agreement and Attorney General Moylan's continued representation of Respondents, including his appearance at the settlement conference. Petitioner confirmed that the administration acted in conformance with the Settlement Agreement when it deposited the first installment of \$3 million in July, 2004.

Several proceedings in this matter occurred since the time of the settlement, all of which received strong media attention, including proceedings involving two Applicants for Intervention. As is discussed below, many of the issues raised by the Governor were raised by the Applicants and resolved by this Court's Order denying intervention. The Governor failed to enter at that time and instead, consistent with his posture before this Court from the time this case was filed, allowed the Attorney General to handle the matters of Respondents.

Thus, the Governor, after nine months of proceedings on this matter with the Attorney General acting on behalf of Respondents, essentially argues that a

1 disagreement with the Attorney General regarding the Administration Plan allows him to
2 set forth his posture before this Court. In effect, the Governor is seeking to turn back
3 the clock and assert a position on the merits of this case, while a valid Settlement
4 Agreement remains before this Court. This even after the parties strained to work out
5 an expedited scheduling order, for which this Court was accommodating.
6

7 The Office of the Attorney General, as recently as October, during a hearing
8 before this Court, confirmed that Respondents are affirmatively proceeding with the
9 Settlement Agreement. The Governor of Guam and his counsel deliberately chose not
10 to participate in any of the proceedings and allowed the parties to vacate the expedited
11 trial dates. The Governor remained aware of the proceedings from the day he received
12 service upon him of the complaint and summons. For six (6) months after the
13 settlement negotiations culminated in the settlement agreement and the taking of this
14 matter off calendar, the Governor unfairly refrained from participating in either the
15 settling of this matter or even the preliminary matters, and waited until after the dates
16 were removed to voice his first opposition. Indeed, the Governor's posture is more akin
17 to a late intervenor, but possessing all the information necessary to participate early on
18 in the case. Only a few days after the case was filed, Governor Camacho was quoted
19 by the media as supporting the payment of EIC and ordering Director Ilagan to begin
20 processing the refunds. The Office of the Governor was also involved in the only known
21 payout of EIC in several years, to one individual.
22

23
24 FRCP Rule 23(d) gives the court power to determine procedures that ensure the
25 fair and efficient conduct of a class action. A settlement and release will not be set
26 aside merely because the "plaintiff harbors substantial misgivings." Vela v. Hope
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28

1 Lumber & Supply Co., 966 P.2d 1196, 1199 (Okla. Ct. App. 1998). It is settled by law
2 that a court has the inherent power to enforce a settlement in a case pending before it.
3 Vari-O-Matic Machine Corporation v. New York Sewing Machine Attachment
4 Corporation, 629 F. Supp. 257, 258 (2d Cir. 1986); see also Meetings & Expositions,
5 Inc. v. Tandy Corp., 490 F.2d 714, 717 (2d Cir. 1974) (holding that "[a] district court has
6 the power to enforce summarily, on motion, a settlement agreement reached in a case
7 that is pending before it."). In addition, courts favor and do not lightly cast aside
8 stipulations of settlement. See Matter of Dolgin Eldert Corp., 31 N.Y.2d 1, 10, 334
9 N.Y.S.2d 833, 286 N.E.2d 228 (Ct. App. 1972). See also Willengrodt ex rel. Majority
10 Peoples' Fund for the 21st Century, Inc. v. Hohri, 953 F. Supp. 557, 560 (S.D.N.Y.
11 1997) (declining to set aside settlement agreement reached in open court and noting
12 that "afterthought or change of mind are not sufficient to justify rejecting a settlement")
13 (citing Rivera v. State, 115 A.D.2d 431, 432, 496 N.Y.S.2d 230, 231 (1st Dep't 1985),
14 aff'd, 159 F.3d 1347 (2d Cir. 1998)).

15
16
17 In Teal v. Eagle Fleet, Inc., the Fifth Circuit upheld a denial of a motion to set
18 aside a settlement agreement. 933 F.2d 341 (5th Cir. 1991). The Court held:

19 The district court enjoys broad discretion in controlling its
20 own docket. Edwards v. Cass County, Tex., 919 F.2d 273,
21 275 (5th Cir.1990). Since the Teals made no showing that
22 their delay in challenging the settlement was warranted, the
23 district court's denial of the motion as untimely was well
24 within the court's discretion. The district court should not be
25 obliged to interrupt the orderly proceedings of its docket to
26 rule on this issue when the Teals could have easily
27 presented these matters earlier. Id. at 275-76.

28 Id. at 346.

In Allen v. Alabama State Bd. of Educ., the defendants contended that a settlement agreement was not binding because the court had yet to approve the agreement for the plaintiff class. 933 F.2d 341, (M.D. Ala 1985), *vacated on other grounds*, Allen v. Alabama State Bd. of Educ. 636 F.Supp. 64 (M.D. Ala. 1985). The court explained:

The process that the court and the named parties must follow to meet these Rule 23(e) requirements is often both expensive and time-consuming. Here, it will require at least one preliminary hearing, appropriate notice to the members of the plaintiff class, receipt of any objections by class members, filing of briefs by proponents and objectors, and a hearing on the settlement during which the proponents and objectors must be given full reasonable opportunity to present their views and evidence. Moreover, there is the added expense to the court and the parties of having to delay trial. It is therefore essential that, before embarking on such procedure, the court and the parties have some assurance that the settlement is binding on the named parties. To allow the named parties to repudiate a settlement at any time, as long as the court has not approved the settlement for the plaintiff class, would permit substantial waste and abuse of the court's and the parties' time and resources; it would be administratively inefficient and unfair to both the court and the parties. This court therefore holds that settlement agreement in a class action lawsuit is just as binding on the named parties as a settlement is on the parties in any other lawsuit, subject of course to the court's final approval of the agreement for the plaintiff class.

933 F.2d 341 at 1054. (citations omitted)(emphasis added).

The Court also addressed the contention that attorneys were not authorized to settle the action:

The defendants contend that the named plaintiffs and plaintiff-intervenors have not authorized their attorneys to settle this lawsuit. "An attorney of record is presumed to have authority to compromise and settle litigation of his client." Mid-South Towing Co., 733 F.2d at 390, quoting Thomas v. Colorado Trust Deed Funds, Inc., 366 F.2d 136,

1 139 (10th Cir. 1966) (emphasis deleted). This presumption
2 has not been overcome here.

3 Id.

4 Here, the Governor has not even filed the proper motions before this Court, and
5 certainly has not set forth nor overcome the standards necessary to set aside the
6 preliminary order in this matter and the Settlement Agreement.

7 The Governor's untimely submission also asserts for the first time that this Court
8 does not have subject matter jurisdiction. Petitioner is well aware that the parties
9 cannot stipulate to subject matter jurisdiction. Judgment may, in some instances, be
10 void for lack of subject matter jurisdiction; however, this occurs only where there is plain
11 usurpation of power, when court wrongfully extends its jurisdiction beyond scope of its
12 authority. Gschwind v Cessna Aircraft Co., 232 F3d 1342 (2000, CA10 Kan).

13 This case was filed alleging jurisdiction under both 48 U.S.C. §1421(h) and 28
14 U.S.C. §1361. The case presents unique circumstances, as the government of Guam
15 not only continued to refuse to pay refundable earned income tax credits, but publicly
16 alleged that the credit was inapplicable to Guam, including blocking out the applicable
17 provision which would allow taxpayers to claim the credit and completely denying the
18 applicability of the entire program.

19 The Supreme Court of Guam recognized the situation years ago, stating that the
20 Executive Branch "has ignored their policy mandate and refused to implement the EIC"
21 In Re Request of I Mina' Bente Sing'ko Na Liheslaturan Guahan Relative to the
22 Application of the Earned Income Tax Program to Guam Taxpayers, 2001 Guam 3.
23 This Court was also presented with a similar issue by Applicant Naputi's insistence that
24 the action included stale claims. This Court did not rule on the matter, but "questioned
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whether the time for making a claim can ever begin to run when a claimant has not been notified of his or her right to such a claim. In other words, since the right to an EIC claim was no longer provided for on the tax return forms, many taxpayers may not have been aware of the fact that they were entitled to such a tax credit." Santos, et al. v. Camacho, et al., Order dated August 5, 2004, Civil Case No. 04-00006.

In Air Line Stewards and Stewardesses Assn. v. Trans World Airlines, Inc., the Seventh Circuit was confronted with a similar situation. 630 F.2d 1164 (7th Circuit 1980). An Intervenor asserted that the district court lacked subject matter jurisdiction to approve a settlement agreement. The court rejected the challenge, reasoning:

While we believe that in a controverted Title VII case the issues raised by intervenor would be both difficult and interesting, we must recognize that we are here reviewing the propriety of a settlement and not a judgment rendered after a trial. We believe that the issues raised by the intervenor should not be decided on the basis of Title VII law, but rather must be decided on the basis of legal principles regulating judicial review of settlement agreements . . .

Settlements are entered into because of "the very uncertainties of outcome in litigation, as well as the avoidance of wasteful litigation and expense" Florida Trailer & Equipment Co. v. Deal, 284 F.2d 567, 571 (5th Cir. 1960). Based on these considerations, this court has held that a district court in reviewing a settlement agreement "should not attempt to decide the merits of the controversy . . . (because) any virtue which may reside in a compromise is based upon doing away with the effect of such a decision." Patterson v. Stovall, 528 F.2d 108, 114 (7th Cir. 1976). 573 F.2d at 963. . . .

We do not share the view, under the circumstances of this case, that the parties' agreement is tantamount to an attempt to confer subject matter jurisdiction by consent. . . .

We think the principles favoring settlement of class action lawsuits remain the same regardless of whether the disputed

1 legal issues center on the jurisdiction of the court over the
2 action. Where, as here, the jurisdictional question is not
3 settled with finality, parties should not be forced to litigate the
4 issue of jurisdiction if they can arrive at a settlement that is
5 otherwise appropriate for district court approval.

6 Id. at 1167-1169.

7 The balance of the Governor's submissions raise the same issues and questions
8 raised by the Intervenors, including lack of discovery, proper notice, and the overall
9 fairness of the Settlement Agreement. As already ordered by this Court, these issues
10 are properly raised at the fairness hearing.

11 CONCLUSION

12 Based on the foregoing, Petitioners request appropriate orders granting
13 Petitioner's motions for Orders approving the Administration Plan and Amended Notice,
14 denying the Governor's "request" to have this Court vacate the Order preliminarily
15 approving the Settlement Agreement; and declaring that the settlement agreement is
16 binding on all named parties, subject to the Court's determining later whether the
17 settlement should be approved for the EIC Class.

18 Respectfully submitted this 8th day of December, 2004.

19
20 PHILLIPS & BORDALLO, P.C.
21 Attorneys for Petitioner

22 By: 
23 Ricardo D. Bordallo
24
25
26
27
28

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Missing money: Governor's chief of staff moves millions into special account

by Mindy Fothergill, KUAM News
Friday, November 19, 2004

Since they were elected into office, the Camacho/Moylan team has had numerous disagreements. As time has passed, despite efforts to get Governor Felix Camacho and Lieutenant Governor Kaleo Moylan to reunite, the rift between them has only grown. It appears with actions taken by the Governor's chief of staff, communication between the two offices has now completely shut down.

While the governor is off-island, his second-in-command was left with a half-million dollar surprise. As KUAM News did some more research, we confirmed the two top public safety agencies are left with a million dollars less in lapsed funds, as the Governor's Office has transferred all of the money into their accounts.

With Governor Camacho off-island, Acting Governor Moylan was in for a surprise Thursday when he learned his office was missing \$500,000. According to Bureau of Budget and Management Research documents, Governor's chief of staff Tony Sanchez requested \$189,000 be transferred from the Lieutenant Governor's Office and the Guam State Clearinghouse to the Governor's Office. Sanchez also requested another \$310,000 be transferred out of the Lieutenant Governor's account and placed into the Governor's Office.

Legislative Vice-Speaker Frank Aguon, Jr. confirms the Governor advised him of several recent transfers of money, adding that the Governor is required by the budget law to provide notice to the Legislature of any transfers within ten days' time. According to a copy of the notice provided to lawmakers, the half-million dollars from the Lieutenant Governor's Office's budget went to the Governor's Office to cover contractual services and office space rent.

While the island's chief executive and his chief of staff are away from Guam, senior advisor to the Governor George Bamba says under the law, Governor Camacho used his authority to transfer all lapsed funds from the previous fiscal year into a separate account at the Governor's Office. While the transfer report to the Legislature indicates the lapsed funds were going to cover contractual services and rent, Bamba says he doesn't know why that was put in the report.

The advisor says the money will be going to other agencies that may run out of money or need extra funds for increments or overtime. Bamba maintains the Governor would lose his transfer authority ability if the funds had not been transferred, and instead the money would have ended up back in the General Fund. Bamba confirms \$1.2 million was transferred out of the Guam Police Department and \$1 million from the Guam Fire Department.

EXHIBIT A

With the money in the Governor's separate account, Bamba maintains that money can be transferred back to the agencies, if the need arises.

As for the half-million taken from the Lieutenant Governor's Office's budget, KUAM News has confirmed the money was put back into the acting governor's account late Thursday after the acting governor learned it had been transferred out. Bamba says he authorized the return of the money upon Acting Governor Moylan's request, adding as a matter of courtesy Moylan should have been notified - but wasn't.

Bamba maintains the transfers are the first of more to come, as BBMR continues doing a government-wide search for lapsed funds. Meanwhile, both the Guam Fire and Guam Police departments were not aware of the transfers. While the acting governor was able to get the half-million returned to his office, GPD and GFD are still left holding the short end of the stick, with \$1 million less for each agency.

Bamba told KUAM News that he did speak to Acting Governor Moylan and relayed the Governor's apologies. Moylan's spokesperson, Phil Roberto, says Bamba indicated to the acting governor that the transfers were inadvertent and contrary to the Fiscal Year 2005 budget, which clearly separates the budgets of the two offices, as well as their respective lapses.

Roberto says corrections have been made and BBMR has since reversed the transfers back to the Lieutenant Governor's accounts. As for the transfers out of the Guam Police and Guam Fire accounts, Roberto says Acting Governor Moylan is not aware of those transfers, saying the Governor would have to answer for his actions.

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Felix Perez Camacho
Governor

Kaleo Scott Moylan
Lieutenant Governor

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The Honorable Vicente C. Pangelinan
Speaker
Mina' Bente Siete Na Liheslaturan Guåhan
155 Hessler Street
Hagåtña, Guam 96910

Re: Settlement Contract in Santos v. Camacho, CV Act. CIV 04-00006

Dear Speaker Pangelinan:

The Governor provides this report regarding the above action to the Legislature pursuant to 5 G.C.A. § 22401 (the "Illegal Expenditures Act"). As you know, that section states in the relevant portion of subpart (a):

No officer or employee of the government of Guam, including the Governor of Guam, shall:

- (1) Make or authorize any expenditure from, or create or authorize any obligation under, any appropriation or fund in excess of the amount available therein, or for other than an authorized purpose;
- (2) Commence, continue, or proceed with any operational activity, construction, improvement, contract, or obligation without an appropriation or fund for the payment thereof; or after any such appropriation or fund is exhausted;
- (3) Involve the government of Guam in any contract or other obligation, for the payment of money for any purpose, in advance of the appropriation made for such purpose;

It further states in subpart (e): "Any violation of this Section by an officer or employee of the Executive Branch shall be reported at once to the Governor by the head of the department or agency concerned, and the Governor shall furnish a report thereon, including the action taken, to the Legislature."

In February 2004, Julie Babauta Santos filed the action entitled *Santos v. Camacho*, District Court of Guam Case No. CV04-00006 against the Governor of Guam,

1041

EXHIBIT B

the Director of the Department of Revenue and Taxation, the Director of Department of Administration, and the Government of Guam. The lawsuit seeks to recover the Earned Income Tax Credit ("EITC") on behalf of all eligible taxpayers. A copy of the complaint is attached.

On June 14, 2004, while the Governor was off-island, the acting governor (Lt. Governor Moylan) and Attorney General Moylan entered into a settlement agreement with plaintiff's counsel, Michael Phillips ("Settlement Contract"). The Settlement Contract provided that the Government of Guam would pay ten percent (10%) of the \$60 million settlement amount, which is \$6 million, to Mr. Phillips in attorneys' fees. It further provided that the Government would pay the rest, or \$54 million, in alleged tax refunds. And it provided that the Government would pay the EITC tax credit in *future* tax years.

The Settlement Contract does not identify any source of appropriation to pay the \$54 million in purported tax refund claims or \$6 million in attorneys' fees. The Settlement Contract does not identify any appropriation to pay EITC tax refund claims in future tax years. The Settlement Contract is not subject to the Legislature's decision to appropriate funds to make these payments. In sum, the Settlement Contract completely bypasses the Legislature's power over the appropriation of funds. This is completely contrary to the words and spirit of the Organic Act, which creates a series of checks and balances to stop any one officer (here, the Attorney General) from committing the government to a \$60 million obligation without oversight. A copy of the tentatively approved Settlement Contract is attached to this report. Exhibit A to this report summarizes the contract's key terms.

Based upon a stipulation of the parties, the District Court has granted preliminary approval of this Settlement Contract. It has not given final approval. The Governor recently filed an objection with respect to the approval of the Settlement Contract on grounds that it violates Guam law. The District Court acknowledged the Governor's concerns and has set a briefing and hearing schedule on the Governor's objections. A copy of the Court's briefing Order is attached hereto.

Although the Attorney General's office was counsel of record in this matter, the Governor's counsel became concerned regarding these issues and sent a letter to the Attorney General. After a substantial delay, the Attorney General's office issued a legal opinion to the Governor. It stated that the tentatively approved Settlement Contract is illegal with regard to the payment of future EITC tax credits. It stated that the \$6 million in attorneys' fees and \$54 million in purported tax refunds were legal. A copy of this letter is attached.

Although the finding that the future payments are illegal already voids the contract, the Governor subsequently inquired as to the Attorney General's rationale for finding the \$6 million in attorneys' fees and \$54 million in purported refund claims legal. The Governor questioned the Attorney General's rationale that these were legal simply because the Governor has the authority to pay final tax judgments from "unencumbered" funds under 48 U.S.C. § 1421i(h)(2). First, the authority to pay final judgments does not necessarily include the power to contract for such a judgment. Second, there are not nearly enough unencumbered funds for the Governor to make the monthly payments required by the settlement contract. Third, \$6 million in attorneys' fees is not a payment of a tax refund judgment. Fourth, the Governor can only pay "final" judgments under 48 U.S.C. § 1421i(h)(2) and the settlement requires interim payments even before a final judgment is entered.

The Governor raised these additional reasons for concluding that the settlement was illegal with the Attorney General. The Attorney General refused to respond. Instead, on November 8, 2004 the Attorney General filed papers in District Court that continued to seek to implement an administrative plan for the settlement. The Attorney General filed these documents in the name of the Governor *in direct contravention of the Governor's instructions*. The Attorney General did this even though his own office had agreed that the settlement was illegal. Because of the legal concerns stated above, the Governor has filed papers opposing the Attorney General's recent filing and position regarding the EITC settlement.

The essence of the Governor's filing was to explain to the Court why he has concluded that the contract is illegal and in violation of the Illegal Expenditures Act. See 5 G.C.A. § 22401(a)(3). These papers also explained that because it is illegal, no further action can be taken to implement this contract. See 5 G.C.A. § 22401(a)(2) (forbidding the participation in any contract that requires the expenditure of non-appropriated funds); *Pangelinan v. Gutierrez*, 2003 Guam 13 (2003) (contract that violates Illegal Expenditures Act is void), *reconsidered in part on other grounds* 2004 Guam 16.

As you know, Governor Camacho is strongly in favor of the Earned Income Tax Credit. He wants to make sure that eligible taxpayers receive the refunds to which they are entitled. But he also knows that no matter how important this tax credit is, the laws of Guam must be followed. Before any money may be paid out, it must be duly appropriated by the Legislature or federal funding must be secured. Neither the Attorney General nor any other official may attempt to override the Legislature's powers to appropriate funds.

The Governor believes that the appropriate mechanism for making any refunds should be through a claims process established by the Legislature and Governor.

The Government should not have to spend \$7 million so that qualified taxpayers receive only 50% due to them. Only a structure established by the Legislature and Governor can remedy the current situation. Indeed, without our combined efforts, the Government and our people may never find the right solution. Indeed, a second class action has been filed against the Government and Governor, illustrating that the settlement has not created permanent peace for the Government. X

Further complicating this matter is the fact that the settlement states that it may pay taxpayers as little as fifty percent of their claims. If there is to be a solution to this matter, it must be a fair solution that does not arbitrarily cut-off taxpayer's rights in favor of paying attorneys' fees and administrative costs.

We have repeatedly asked the Attorney General, both orally and in writing, for further information regarding the negotiation of the Settlement Contract and the advice his office provided to the government regarding it. We have not received any acknowledgment of this request, much less a response. Along with opposing the illegal contract, the Governor will continue to seek these papers.

Very Truly Yours,



Shannon Taitano
Legal Counsel to the Governor of Guam
On Behalf of the Governor of Guam,
Felix P. Camacho

cc: All Senators
Kaleo S. Moylan, Lt. Governor of Guam
Art Ilagan, Director, Department of Revenue & Taxation
Lourdes Perez, Director, Department of Administration